(1)

No. 00-555

IN THE

Supreme Court of the United States

WORLDCOM, INC., *et al.*,
Petitioners,

v.

VERIZON COMMUNICATIONS, INC., *et al.*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does § 252(d)(1) of the Telecommunications Act of 1996, while permitting the Federal Communications Commission to use a forward-looking cost methodology to set rates for unbundled network elements, forbid the Commission from basing rates on the efficient replacement cost of existing technology?

2. Does § 251(c)(3) of the 1996 Act, while permitting the Commission to order incumbent carriers to provide unbundled network elements to new competitors in combined form, forbid the Commission from requiring incumbent carriers to honor requests from new competitors to have elements combined in ways that the incumbent has not previously combined them?

3. Does § 252(d)(3) of the 1996 Act, which requires that wholesale rates for resold services be discounted by the costs that will be avoided by an incumbent carrier, prohibit the Commission from selecting a methodology that discounts wholesale rates by the costs that incumbent carriers are reasonably able to avoid, rather than only those costs that an individual incumbent, in its discretion, chooses to avoid when it sells its services to new competitors?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings before the Eighth Circuit are listed in the Appendix at Pet. App. 1a, 35a-38a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

WorldCom, Inc.

WorldCom, Inc., through its wholly-owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally. WorldCom, Inc is a publicly traded company on the Nasdaq National Market under the symbol "WCOM." No publicly held company owns 10 percent or more of WorldCom, Inc. stock.

The Association for Local Telecommunications Services

The Association for Local Telecommunications Services ("ALTS") is the national trade association representing facilities based providers of competitive local telecommunications services. ALTS has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Competitive Telecommunications Association

The Competitive Telecommunications Association ("CompTel") is a national industry trade association representing competitive telecommunications carriers and their suppliers. Its over 300 members include large nationwide suppliers as well as scores of smaller regional carriers. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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WorldCom, Inc., ALTS[1/] and CompTel petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.[2/]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 219 F.3d 744, and is reprinted at Pet. App. 1a-33a. That decision reviewed the First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 8, 1996) ("*Local Competition Order*"), issued by the Federal Communications Commission. The *Local Competition Order* is published at 11 F.C.C.R. 15499 (1996).

JURISDICTION

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The Eighth Circuit entered its decision on July 18, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276. The relevant provisions of the 1996 Act are reprinted at Pet. App. 134a-151a. This case also involves the *Local Competition Order*, published at 11 F.C.C.R. 15499 (1996), and the accompanying regulations, codified at 47 C.F.R. §§ 51.1-51.809 relevant regulations are reprinted at Pet. App. 152a-158a. The relevant portions of the *Local Competition Order* and the accompanying regulations are reprinted at Pet. App. 39a-133a.

1/ ALTS joins this petition with respect to Issues I and II only.

2/ WorldCom, Inc. is now the parent company that includes the subsidiary which is a party to this proceeding. For clarity and ease of reference, the petitioning party is referred to as WorldCom, Inc.

STATEMENT OF THE CASE

This petition seeks review of an Eighth Circuit decision invalidating, for the second time, regulations promulgated by the Federal Communications Commission (the "FCC" or "Commission") to implement the Telecommunications Act of 1996, a statute designed to make local telephone markets competitive "as quickly as possible." H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep."). Responding to Congress's mandate, the FCC issued comprehensive regulations to implement the Act within six months of its passage, releasing an order on August 8, 1996. Petitions for review of that Order were consolidated in the Eighth Circuit which stayed, and then vacated, a number of the FCC's regulations, including the FCC's pricing rules, primarily on the ground that the FCC lacked authority to promulgate them. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*IUB*"). This Court reversed in part, reinstating, among others, the pricing regulations at issue. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). On remand, the Eighth Circuit again invalidated several of the FCC's pricing regulations and portions of the Commission's unbundling rules.

In doing so, the Eighth Circuit has created a conflict with the Fifth Circuit over the validity of the pricing methodology the FCC has adopted to implement various sections of the 1996 Act. Its decision also conflicts with state commissions and federal courts which have independently concluded that the Act permits the use of such a methodology. Similarly, the Eighth Circuit's decision with respect to the combination of network elements is in direct and acknowledged conflict with two decisions of the Ninth Circuit – which held, relying on this Court's decision in *AT&T*, that the 1996 Act permits the type of requirement adopted by the Commission. Finally, the Eighth Circuit's decision on wholesale pricing conflicts with state administrative and federal judicial decisions which have

either adopted or approved the methodology implemented by the FCC. In short, the Eighth Circuit has now dismantled the national consensus with respect to the appropriate implementation of the 1996 Act. Thus, more than four years after the FCC's regulations first issued, the rules under which competition will emerge remain unsettled. Review by this Court is urgently needed to fully and finally resolve whether the FCC's rules are valid, or whether States and the Commission must start the process of opening local markets to competition anew.

A. The 1996 Act

The 1996 Act was designed to open historically monopolized local telephone markets and offer consumers the benefits of competition "as quickly as possible." H. Rep. at 89. Congress preempted all state laws restricting local competition, including the exclusive franchises states had historically granted incumbents to provide local service. Congress recognized, however, that merely removing legal impediments to entry would not bring about robust competition, at least in the short term. "[B]ecause the investment necessary is so significant," competitors could not quickly replicate the ubiquitous networks that the incumbents had built-up over decades under a regime funded by captive customers. *See* H.R. Conf. Rep. No. 104-458, at 148 (1996).

Congress therefore established comprehensive requirements "intended to facilitate market entry." *AT&T*, 525 U.S. at 371. "Foremost" among them is the incumbent's obligation to "share its network with competitors." *Id.* Specifically, incumbents must allow new competitors to: (i) "interconnect" their competing networks so that their customers can call, and receive calls from, the incumbent's customers; (ii) lease unbundled elements of the incumbent's network, either alone or in combination; and (iii) resell the incumbent's services. 47 U.S.C. § 251(c)(2), (3), (4).

Resale is the easiest and fastest mode of entry, and is also attractive for firms that "lack capital" to "purchase unbundled elements" or "build[] their own networks." *Local Competition Order* ¶ 907 (Pet. App. 127a). A reseller cannot, however, provide the "exchange access" services that represent a significant portion of local telephone revenues. Moreover, competitors may not alter the resold service; resale thus offers only a limited opportunity for innovation in service and price.

In contrast, by authorizing the leasing of unbundled parts of the network, Congress created an innovative way for new competitors to compete effectively and rapidly in local markets. This approach allows new competitors to use existing elements to offer new and different services to consumers. It also allows new entrants to build their own networks gradually, supplementing their own facilities with leased elements as they expand into new geographic areas.

Congress also recognized that real competition would never occur if the rates incumbents charged for use of the existing network were too high to allow new entrants to price their own offerings competitively. Congress thus required that rates for interconnection and for leasing network elements be "just, reasonable, and nondiscriminatory" and "based on the cost . . . of providing" the element, 47 U.S.C. §§ 251(c)(3), 252(d)(1), and that wholesale rates be calculated by excluding from retail rates costs that will be avoided when these services are sold at wholesale, *id.* § 252(d)(3).[3/]

3/ In so doing, Congress departed from the prior regulatory scheme by expressly prohibiting states from using "rate-of-return" ratemaking. Under a rate-of-return regime, regulators set rates based on a firm's past investments – its "historical" or "embedded" costs. In practice, the problem with a rate-of-return approach was that its reliance on incumbents' books to establish rates inevitably led to waste and inefficiency. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 407 (5th Cir. 1999), *cert. granted sub nom. GTE Service Corp. v. FCC*, 120 S. Ct. 2214 (2000);

Congress expressly delegated to the FCC the authority to promulgate rules to implement these general requirements, 47 U.S.C. §§ 201(b), 251(d)(1), and asked the FCC to do so expeditiously. *Id.* § 251(d)(1) (requiring rules within six months of enactment). Apart from the general directives described above, the 1996 Act established few clear limits on the FCC's exercise of this authority. As this Court has recognized, the key provisions of the 1996 Act are subject to multiple interpretations, and Congress was "well aware" that these ambiguities would be resolved by the FCC. *AT&T*, 525 U.S. at 397.

B. FCC Regulations

After a notice and comment period that generated thousands of pages of comments from more than 200 parties, the FCC released the *Local Competition Order* on August 8, 1996. In a portion of the Order comprising more than 200 paragraphs, the Commission concluded that prices for interconnection and unbundled elements should be based on a "forward-looking long-run economic cost" approach rather than on the "historical" or "embedded" cost approach that prevailed in the monopoly era. *Local Competition Order* ¶ 672 (Pet. App. 84a-85a). Both approaches measure all the costs of providing network elements, but in two different ways: the

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National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 178 (D.C. Cir. 1993); *In re Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 F.C.C.R. 6786 ¶ 29 (1990), *on reconsideration*, 6 F.C.C.R. 2637 (1991) (*"Price Cap Order"*). Moreover, regulators under a rate-of-return approach could not "drive LECs to become more efficient and productive" because rate-of-return regulation creates no incentive to innovate. *Price Cap Order* ¶ 30. The result of such regulation was thus inefficient networks and outdated technology, resulting in rates far above those that would prevail in a competitive market. The failures of such an embedded-cost approach led the Commission and the states to turn increasingly away from "traditional rate of return practices." *Id.* ¶ 39; *National Rural Telecom. Ass'n*, 988 F.2d at 178.

money spent in the past to create the network in existence (a historical-cost approach) or the money needed today to build an efficient local network with the same capabilities (a forward-looking approach). *See id.* ¶ 705 (Pet. App. 104a-105a).

As the FCC explained, prices in a competitive market are based on forward-looking costs. *Id.* ¶ 675 (Pet. App. 86a). New entrants – which build new facilities using the lowest cost, most efficient technology available – set prices on that basis. If a firm in a competitive market were to set prices based on historical costs when they exceed forward-looking costs, it would be driven out of business. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1117 (7th Cir. 1983). Thus, setting prices at forward-looking cost replicates conditions in a competitive market, thereby "driv[ing] retail prices to their competitive levels." *Local Competition Order* ¶ 679 (Pet. App. 88a-89a); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) (forward-looking costs "mimic[] the operation of the competitive market").

The particular forward-looking approach adopted by the Commission – called "Total Element Long Run Incremental Cost" or "TELRIC" – is a variant of the forward-looking cost methods that had gained wide acceptance in the professional literature, had been implemented by state utility commissions prior to passage of the 1996 Act, *see Local Competition Order* ¶ 631 & nn.1508-14 (Pet. App. 50a-51a), and had been used by numerous regulatory agencies in analogous contexts. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 411-12 & nn.12 & 13 (5th Cir. 1999), *cert. granted sub nom. GTE Serv. Corp. v. FCC*, 120 S. Ct. 2214 (2000) ("*Texas OPUC*"). To determine the TELRIC rate for a network element, the direct forward-looking cost of constructing, maintaining, and operating the element is calculated. 47 C.F.R. § 51.505(b)(1). That calculation includes the cost of capital, thus allowing

firms to recover a "normal" economic profit. *Local Competition Order* ¶¶ 699-700 (Pet. App. 100a-101a). The portion of forward-looking joint and common costs attributable to each element is then added. *Id.* ¶¶ 682, 694 (Pet. App. 90a-91a, 96a-97a). Hence, TELRIC allows incumbents to recover all of the forward-looking costs, plus a normal rate of return, associated with providing a network element.

In designing its TELRIC methodology, the Commission balanced policy goals. First, it wanted to ensure that incumbent carriers were compensated for the total cost of providing a network element. The FCC thus rejected a short term incremental, or marginal, cost approach that does not measure fixed costs (such as plant), but instead measures only the *additional* cost an incumbent incurs in providing a given element to a new entrant. The FCC's methodology uses a "period long enough that all costs are treated as variable and avoidable," and are thus measured and attributed to the cost of each element. *Local Competition Order* ¶ 692 (Pet. App. 95a). A long-term methodology, coupled with attribution to each element of a reasonable share of joint and common costs, ensures that the rates capture *all* costs associated with each element.

Second, the Commission wanted to ensure that, as Congress directed, consumers received the benefit of competition as soon as possible. In a functioning competitive market, if a firm sets its prices above forward-looking cost, a competitor will enter the market and undermine those prices, until prices are driven to forward-looking cost. In adopting a methodology that simulated a competitive market, the Commission sought to accomplish its goal of bringing those benefits quickly to local consumers. *See id.* ¶ 679 (Pet. App. 88a-89a).

Third, the Commission wanted to encourage and facilitate efficient entry. If the rates for network elements are set below

forward-looking cost, new entrants might be deterred from building competing facilities. Moreover, some new entrants would be induced to enter using network elements where it would not otherwise be economically efficient for them to do so. If the rates for network elements are set too high, however, competitive entry may never occur. That is because the time it takes to build a competing ubiquitous network is sufficiently long that competitors are *forced* to rely, at least in part, on leased elements. If the rates at which the elements are priced are too high to allow new entrants to price their retail services at competitive levels, new entrants will be forced out of business before competition ever takes hold. By designing a forward-looking cost methodology that simulated a competitive market, the Commission sought to ensure that the rates eventually produced by that methodology would encourage new entrants to build competing facilities, *id.* ¶ 685 (Pet. App. 92a), without stifling competition from the outset.

The FCC also carefully evaluated alternatives to its TELRIC methodology, as well as more general objections to the use of forward-looking pricing. The Commission rejected historical-cost pricing, in accordance with "[t]he substantial weight of economic commentary in the record," *id.* ¶ 705 (Pet. App. 104a-105a), because it would force competitors to pay for the existing inefficiency of the incumbents' networks and would not "ensure the efficient investment decisions and competitive entry contemplated by the 1996 Act." *Id.* Additionally, the Commission specifically considered the practicality of forward-looking cost models and concluded (on the basis of the States' increasing use of such models) that such models were practical. The Commission assessed and rejected an "efficient component pricing" methodology proposed by one of the incumbent carriers, on the ground that it would inappropriately inflate rates for network elements. *Id.* ¶¶ 708-

711 (Pet. App. 107a-109a).[4/] The Commission likewise rejected a "Ramsey Pricing" model on the ground that it was particularly ill-suited to achieving the goals of the 1996 Act. *Id.* ¶¶ 645, 696 & n.1700 (Pet. App. 64a-65a, 98a).[5/] The FCC also declined to establish a formula that would estimate the "forward-looking" cost of the incumbent's *existing* network. *Id.* ¶ 684 (Pet. App. 91a-92a). Because this approach would allow incumbents to recover costs "that reflect inefficient or obsolete network design and technology," the FCC found it would be "essentially an embedded cost methodology." *Id.*

The FCC also promulgated Rules 315(b)-(f), which collectively are designed to ensure that new entrants can use the network elements in the incumbents' networks to provide telecommunications services. These rules prohibit the incumbents from separating elements already combined in their network, and require incumbents to combine requested elements that are not already combined to the extent technically feasible. The Commission determined that such a requirement was necessary to prevent discrimination, because new entrants do not, as a practical matter, have the necessary information about the incumbents' networks to combine elements without the assistance of the incumbent. *Local Competition Order*

4/ The efficient component pricing methodology includes the "opportunity cost the incumbent carrier incurs when the new entrant provides the services instead of the incumbent." *Id.* ¶ 708 (Pet. App. 107a). That cost is computed by subtracting incremental cost from revenue; because existing rates are not cost-based, use of efficient component pricing would thus simply preserve the monopoly revenue stream. *Id.*

5/ Ramsey pricing allocates more joint and common costs to services with relatively inelastic demand. "[S]uch an allocation could unreasonably limit the extent of entry into local exchange markets by allocating more costs to, and thus raising the prices of, the most critical bottleneck inputs, the demand for which tends to be relatively inelastic." *Id.* ¶ 696 (Pet. App. 98a).

¶ 293 (Pet. App. 40a-41a). Thus, absent its combinations requirements, the Commission concluded that the ability to use network elements to provide local service would be seriously undermined. *Id.*

The Commission also established regulations governing the rates at which services are sold to new entrants for resale. The 1996 Act specifies that the wholesale rate charged by the incumbent be equal to its retail rate, minus retailing costs that "will be avoided," 47 U.S.C. § 252(d)(3), a standard that necessarily entails a predictive judgment. Accordingly, the FCC determined that costs that "will be" avoided are those costs "that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale . . . to a requesting carrier." 47 C.F.R. § 51.609(b). The alternative, the FCC recognized, would be wholesale rates that include even those costs that reasonably could be avoided, whenever the incumbents simply chose not to avoid those costs in practice. The FCC concluded that Congress could not have intended incumbents to "sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable." *Local Competition Order* ¶ 911 (Pet. App. 129a).

C. Judicial Proceedings

In response to an initial challenge by incumbents and others, in 1997 the Eighth Circuit invalidated the FCC's pricing rules on jurisdictional grounds and FCC Rule 315(b)-(f) on substantive grounds. *IUB*, 120 F.3d at 800 & n.21. This Court reversed those rulings. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Court held that Congress granted the FCC ample authority to promulgate the challenged pricing rules. *Id.* at 378. The Court also reinstated Rule 315(b), holding that although the Act contemplates that elements *may* be requested and provided as discrete pieces, the Act "does not say, or even remotely imply, that elements must be provided

only in this fashion and never in combined form." *Id.* at 394.

On remand, the Eighth Circuit ruled that the plain meaning of the 1996 Act foreclosed the FCC from (i) adopting one significant portion of its TELRIC pricing standard for unbundled elements; (ii) requiring incumbents to combine unbundled network elements for new competitors if the elements are not currently combined in the existing network; and (iii) calculating wholesale rates for resold services on the basis of costs the incumbent reasonably can be expected to avoid.

With respect to the pricing of network elements, the Eighth Circuit found that the term "cost" in § 252(d)(1) "is ambiguous" and that the FCC therefore had the authority to interpret the term to allow for a forward-looking cost model. Pet. App. 9a. The court of appeals further held that the FCC's "use of a forward-looking cost methodology was reasonable," noting that the FCC had explained its reasoning "in detail." *Id.* The court also held that the doctrine of constitutional avoidance did not require the FCC to use a historical cost model, citing well established law that "a takings claim cannot be based on the ratemaking methodology but must be based on the rate itself." Pet. App. 13a. Having concluded that both the 1996 Act and the Constitution permitted rates based on forward-looking costs, the Eighth Circuit nevertheless invalidated a key portion of the FCC's TELRIC methodology. The court believed that the language of § 252(d)(1) – which mandates rates based on the "cost . . . of providing the . . . network element" – precluded a forward-looking cost methodology that calculates costs by reference to efficient technology and design choices. Pet. App. 6a.

With respect to the FCC's combination rules, § 315(c)-(f), the Eighth Circuit concluded that this Court's reversal of its

prior reading of § 251(c)(3) did not require any change in the prior ruling invalidating those rules.

With respect to the FCC's wholesale discount for resold services, the Eighth Circuit held that § 252(d)(3)'s requirement that the discount be based on the costs that "will be avoided" foreclosed the FCC rule requiring the discount to be calculated on the basis of the costs the incumbent reasonably should avoid. According to the Eighth Circuit, the wholesale discount must be based on the costs the incumbent actually avoids when selling service wholesale, even if these costs are unreasonably small because the incumbent has chosen to incur costs it could easily have avoided.

In response to motions filed by the Commission, WorldCom, AT&T and others, on September 22, 2000 the Eighth Circuit stayed that part of its mandate invalidating a portion of the FCC's TELRIC rules pending the ultimate disposition of petitions for certiorari filed with this Court.

REASONS FOR GRANTING THE PETITION

This case presents three important questions. *First*, does § 252(d)(1) of the 1996 Act, while permitting the FCC to use a forward-looking cost method to set rates for unbundled network elements, forbid the FCC from basing rates on the efficient replacement cost of existing technology. *Second*, does § 251(c)(3) of the 1996 Act, while permitting the FCC to order incumbents to provide unbundled network elements to new competitors in combined form, forbid the FCC from requiring incumbents to honor requests from new competitors to have elements combined that the are not currently combined in the incumbents' network. *Third*, does § 252(d)(3) of the 1996 Act require the FCC to adopt a methodology for the calculation of wholesale rates for resold services that is based on the costs that incumbents choose to avoid when they sell their services

at wholesale, rather than the costs a carrier would reasonably be able to avoid.

Each of these questions warrants review. *See* S. Ct. Rule 10. On all three of the issues, the Eighth Circuit's decision conflicts with decisions of other courts. *See Texas OPUC*, 183 F.3d at 412-13 (upholding TELRIC methodology); *MCI Telecommunications Corp. v. U S West Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000) (§ 251(c)(3) does not foreclose requirement that incumbents provide new combination of unbundled network elements to requesting carriers), *petition for cert. filed*, 69 U.S.L.W. 3143 (U.S. Aug. 7, 2000) (No. 00-214); *GTE South, Inc. v. Morrison*, 6 F. Supp. 2d 517, 524-26 (E.D. Va. 1998) (upholding "reasonably avoided" methodology for resale rates), *aff'd*, 199 F.3d 733 (4th Cir. 1999). Moreover, the Eighth Circuit's decision will wreak havoc with the current rules governing local competition. Even before this Court's ruling in *AT&T*, most States had announced that they would voluntarily adopt the FCC's TELRIC model to set rates for unbundled network elements, and all have been required to do so since that decision. States had similarly adopted the FCC's "reasonably avoided" standard for resold services. Thus, the Eighth Circuit's decision effectively invalidates a national consensus among state utility commissions and the FCC regarding how intercarrier rates should be set to implement the 1996 Act. Finally, by purporting to find clear statutory limits on the FCC's authority where none in fact exist, the Eighth Circuit has arrogated to itself the task of setting national telecommunications policy – a task that properly belongs with the FCC.

More fundamentally, this Court should review the questions presented here because enforcing the Eighth Circuit's mandate would send the States and the FCC back to square one in their efforts to bring competition to local telephone markets. As this Court has recognized, the 1996 Act "profoundly affects

a crucial segment of the economy worth tens of billions of dollars," *AT&T*, 525 U.S. at 397, and "fundamentally restructures local telephone markets," *id.* at 371. The FCC rules invalidated by the Eighth Circuit are critical to implementing what this Court has described as the "foremost" requirements for opening local markets. *Id.* Now, almost five years after passage of the 1996 Act, the Eighth Circuit would require the States and the FCC to start over. The FCC would have to begin a new rulemaking proceeding to devise new pricing principles for unbundled network elements and resold services. Each State would then have to conduct proceedings to choose specific models to implement the new rules, followed by further proceedings to set prices based on the new models. Because the Eighth Circuit misread the 1996 Act, it would frustrate the will of Congress, as well as the interests of consumers, to force the rules for local competition to be rewritten at this late date. In no event should such a drastic overhaul occur without this Court reviewing the merits of the FCC's rules.

I. THE EIGHTH CIRCUIT'S DECISION VACATING A CRITICAL PORTION OF THE FCC'S METHODOLOGY FOR PRICING UNBUNDLED ELEMENTS CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT, IS INTERNALLY INCOHERENT, AND SEVERELY THREATENS THE EMERGENCE OF LOCAL COMPETITION.

1. The Eighth Circuit's decision conflicts with the decision of the Fifth Circuit in *Texas OPUC v. FCC* over whether the Act prohibits the Commission from adopting TELRIC's forward-looking measure of cost. In *Texas OPUC*, the Fifth Circuit upheld the FCC's use of TELRIC to set rates for a portion of the subsidies provided to carriers which offer local service to high cost customers. In doing so, the Fifth Circuit squarely rejected the incumbents' argument that

TELRIC is invalid because it measures the forward-looking costs of a hypothetical network rather than the incumbents' existing network. *Texas OPUC*, 183 F.3d at 412-13. The Eighth Circuit, however, concluded just the opposite, holding that "basing the allowable charges . . . on what the costs would be if the ILEC provided the most efficient technology and in the most efficient configuration available today utilizing its existing wire center locations violates the plain meaning of the Act." Pet. App. 6a-7a.

This Court has already granted review of the Fifth Circuit's decision to decide whether the FCC's use of the TELRIC methodology to calculate federal universal service subsidies violates the Fifth Amendment's just compensation requirement. *See GTE Services Corp. v. FCC*, 120 S. Ct. 2214 (2000). The pendency before this Court of the *GTE Service Corp.* case does not, however, counsel in favor of deferring consideration of WorldCom's petition for certiorari. Although both this case and *GTE Service Corp.* involve challenges to the FCC's use of TELRIC, there is little prospect that the Court's decision in the *GTE Service Corp.* case will resolve the issues raised by the Eighth Circuit's decision in the present case. *GTE Service Corp.* involves a challenge to the FCC's use of TELRIC to calculate subsidies (not rates) that all carriers (not just incumbents) will receive under § 254 when they agree to provide service in high-cost areas. The only issue properly before the Court in *GTE Service Corp.*, therefore, is whether the FCC's use of a forward-looking TELRIC methodology to calculate those high-cost subsidies violates the Just Compensation Clause of the Fifth Amendment. This Court's resolution of that question could obviate the need for review here only if the Court agrees with petitioner GTE's contention that the Fifth Amendment precludes the use of a forward-looking cost methodology such as TELRIC in all contexts.

As demonstrated by respondents in *GTE Service Corp.* (in briefs filed September 28, 2000), there are insuperable obstacles to the Court even reaching the Fifth Amendment claim GTE has raised. To decide for GTE, this Court would have to hold that the Fifth Amendment precludes the use of a forward-looking cost method to calculate not only rates but also *subsidies* which – because they are a giving rather than a taking – cannot possibly amount to a confiscation of property in violation of the Fifth Amendment.[6/] Indeed, the likelihood that *GTE Service Corp.* will resolve the issues presented by the Eighth Circuit's decision in this case is so slim that even the incumbents have contended (in a separate petition for certiorari challenging that decision (No. 00-511)) that this Court should not hold the petitions in this case pending a decision in *GTE Service Corp.*

In contrast to the low probability that a decision in *GTE Service Corp.* will preclude the need for review here, the harm occasioned by delaying review of the issues presented in this case is both certain and great. If a decision on the instant petition is delayed until *GTE Service Corp.* is decided, there is virtually no prospect that the Eighth Circuit's decision will be reviewed this Term. That will extend by at least another year the destabilizing uncertainty the Eighth Circuit's decision has introduced into local markets. Although the Eighth Circuit has stayed the effect of its invalidation of TELRIC, the pendency of this case will continue to cast a pall over the decisions of the financial markets whether to support the massive investments

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6/ In *GTE Service Corp.*, respondents argued that the provision of a subsidy cannot amount to a taking and that, even if GTE could overcome that hurdle, it had not presented any evidence that would allow this Court to determine whether the use of TELRIC to calculate the federal subsidy had *any* impact, much less a confiscatory impact. If the Court disposes of that case on either of these grounds, it will have no impact on the issues presented here.

new competitors must make to make inroads into local markets, as well as the business plans of those competitors – who cannot make sound decisions about where, when or how to compete until they have some certainty about the costs they will incur. And state utility commissions undertaking a new round of arbitrations under the 1996 Act (because the original agreements have expired or will shortly do so) face the prospect of having to redo all their work. In short, the interests of all concerned – the new competitors, the incumbents, and state commissions – would be seriously compromised if review of the Eighth Circuit's decision were significantly delayed.[7/]

2. Review is also warranted because the Eighth Circuit impermissibly substituted its own judgment for that of the FCC on the critical question of how intercarrier rates should be set.

a. The Eighth Circuit erred in concluding that a portion of the FCC's TELRIC regulations is inconsistent with § 252(d)(1) of the 1996 Act, and thus is not entitled to *Chevron* deference. Invalidation of an agency's implementing regulation under the first prong of *Chevron* is appropriate only if "Congress has . . addressed the precise question at issue" and *unambiguously foreclosed* the FCC's choice. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *AT&T*, 525 U.S. at 397 (pursuant to *Chevron*, courts are only to "enforce the clear limits that the 1996 Act contains"). As the Eighth Circuit itself recognized, Congress has not prohibited the FCC from using forward-looking cost methods. "[T]he term 'cost,' as it is used in the statute, is ambiguous, and Congress has not spoken directly on the meaning of the word in this context." Pet. App. 9a. Accordingly, "[t]he FCC has the

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7/ The issues presented in Sections II and III of this petition are completely independent from the issues presented in *GTE Service Corp.* The pendency of *GTE Service Corp.* thus provides no basis to delay resolution of those issues.

authority to make rules" that implement the Act's rate provisions. *Id.* In the *Local Competition Order*, "the FCC explained in detail its reason for selecting a forward-looking cost methodology to implement the new competitive goals of the Act." *Id.* Thus, the Eighth Circuit concluded, "the FCC's use of a forward-looking cost methodology was reasonable." *Id.*

Having reached this correct conclusion, the Eighth Circuit nonetheless held that § 252(d)(1) unambiguously precludes the FCC from adopting TELRIC. "It is clear from the language of the statute," the court held, "that Congress intended the rates to be 'based on the cost . . . of providing *the* interconnection or network element' . . . not on the cost some imaginary carrier would incur by providing the newest, most efficient, and least cost substitute for the actual item or element which will be furnished." Pet. App. 7a (emphasis in opinion). The court then detailed its understanding of what the Act mandates: "The new entrant competitor, in effect, piggybacks on the ILEC's existing facilities and equipment. It is the cost to the ILEC of providing that ride on those facilities that the statute permits the ILEC to recoup." *Id.* Thus, the Eighth Circuit concluded, the portion of the FCC's rule requiring forward-looking cost to be measured by reference to an efficient network is unlawful.

As an initial matter, the Eighth Circuit's reliance on the word "the" is perplexing. In the Act, Congress mandated only that "the just and reasonable rate for the interconnection of facilities and equipment . . . and the just and reasonable rate for network elements . . . (A) shall be (i) based on the cost . . . of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit." 47 U.S.C. § 252(d)(1). The use of "the" in subsection (d)(1) merely identifies the thing to which the cost-based requirement applies. Congress was not cabining the

FCC's discretion when it inserted the word "the" before the phrase "interconnection or network element."

More fundamentally, however, the Eighth Circuit's resolution of this issue vividly confirms the wisdom of the cardinal rule that courts should not try to substitute their own views of policy for those of the expert agency. A long-run methodology assumes a period long enough that all costs are variable. That is to say, the very nature of such a methodology assumes that all plant and equipment can be replaced. If all plant and equipment can be replaced, any rational firm would do so in an efficient manner. That existing equipment might be replaced with different equipment is irrelevant. The long term forward-looking cost of *the* original piece of equipment is the cost of the efficient, new equipment needed to replace it. Because the FCC's TELRIC methodology measures the forward-looking cost of the incumbent's equipment, it meets the Act's requirements, and does so in a way that produces efficient results consistent with sound economic theory.

The confusion in the Eighth Circuit's decision is further demonstrated by the fact that it is far from clear what the court believed the 1996 Act requires. The court's conclusion that "it is the cost to the ILEC of carrying the extra burden of the competitor's traffic that Congress entitled the ILEC's to recover," Pet. App. 7a, suggests that the Act mandates a pure incremental cost methodology. Although this might be a plausible reading of § 252(d)(1), the Eighth Circuit did not appear to understand that it might be mandating a sweeping downward departure from TELRIC.

Similarly, it could be that the Eighth Circuit envisioned a cost-methodology that attempts to calculate the cost to reproduce the identical equipment in the incumbents' network at today's costs, even if such a network would never be built today because the technology deployed is obsolete and inefficient. But this "reproduction cost" methodology has long

been discredited in both precedent and economic literature. As this Court explained in *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548, 567 (1945), for example, in rate-setting contexts it never has been held that state commissions must "fix rates on the present reproduction value of something no one would presently want to reproduce."[8/] *See also Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 312 (1923) (Brandeis, J., concurring) (describing as the *least* appropriate methodology "what it would cost to reproduce the identical property").

b. To the extent the Eighth Circuit intended to require that the Commission measure the cost of obsolete technology, that would undermine Congress' goal of bringing competitive market conditions to local markets as quickly as possible – a goal that the Eighth Circuit itself recognized was furthered by a forward-looking cost methodology. *See* Pet. App. 9a; *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 n.10 (1991) (courts must "adopt that sense of words which best harmonizes with context and promotes [the] policy and objectives of [the] legislature"). If new competitors could enter the local market immediately by building ubiquitous networks, they would set prices based on forward-looking costs using the latest and most efficient technologies, and incumbents would be forced to follow suit. The FCC's TELRIC methodology achieves a similar result in the short term by allowing new entrants to lease parts of the existing network at their competitive market value (and therefore set rates on that basis). *See Duquesne*, 488 U.S. at 308 (forward-looking costs "mimic[] the operation of

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8/ Because it incorporates the costs of inefficiencies and obsolete technologies that cannot be recouped in a competitive market, attempting to calculate "forward-looking" costs of obsolete equipment is essentially an embedded cost methodology. *See Local Competition Order* ¶ 684 (Pet. App. 91a-92a).

the competitive market"); *Potomac Elec. Power Co. v. ICC*, 744 F.2d 185, 189 (D.C. Cir. 1984) (forward-looking prices are a "surrogate" for competition in industry where competition itself has not yet taken root). *See Local Competition Order* ¶ 679 (Pet. App. 88a-89a). The FCC's approach serves the goals Congress established by encouraging the "*efficient* entry and utilization of the telecommunications infrastructure," *id.* ¶ 630 (Pet. App. 49a-50a) (emphasis added), and sending the correct signals for entry, investment, and innovation to producers, investors, and consumers.

3. There is a pressing need for review. The 1996 Act was intended to "fundamentally restructure[] local telephone markets" to permit competition for the first time, *AT&T*, 525 U.S. at 371, and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *Id.* at 397. Although the ability of meaningful competition to emerge depends on many factors, one critical determinant is the price new entrants must pay for the inputs needed to provide local service. The TELRIC pricing methodology adopted in the FCC's *Local Competition Order* represents the expert agency's considered judgment about the most appropriate measure of cost and (in particular) the most appropriate measure of forward-looking cost, in this context. By relegating new competitors to prices that reflect the inefficiencies and outdated technology in those networks, the Eighth Circuit decision threatens to stifle the local competition created by the Act.

Moreover, the Eighth Circuit's decision ensures that, over four years after the issuance of the *Local Competition Order*, there is no answer to the question what new competitors must pay for access to the local network. As long as the critical pricing rules remain in flux, new entrants cannot develop entry

plans, and competition will remain stalled.[9/] Absent review by this Court, that uncertainty will continue for years as the FCC attempts to conform its rules to what the Eighth Circuit intended – with judicial review of any new rules it adopts virtually certain. This paralyzing uncertainty alone warrants review. But review is even more critical given the state of the telecommunications marketplace. A corollary to the Act's market opening provisions is a provision allowing the former Bell Operating Companies ("BOCs") to begin providing long distance service. In order to prevent the re-monopolization of the telephone industry, the Act was designed to ensure that BOC long-distance entry occurred only after local markets were fully, and irrevocably, competitive. 47 U.S.C. § 271. Section 271 authority has already been granted to Verizon in New York and to SBC in Texas. The Bell Operating Companies in each of those states have made dramatic inroads into the long-distance markets – with Verizon obtaining a greater market share in New York than Sprint (the nation's third largest long-distance company) within a mere three months. If this trend continues while local competition stalls, the telephone market will quickly regress into one market controlled by a few, dominant incumbent local exchange companies – the very antithesis of the vibrant competition Congress intended.

9/ Over four years after the passage of the Act, incumbents retain 96% of the local market share. *See*, Industry Analysis Division, Common Carrier Bureau, FCC, *Local Telephone Competition at the New Millennium*, at Table 4 (rel. Aug. 2000).

II. THE EIGHTH CIRCUIT'S INVALIDATION OF §§ 51.315(C)-(F) OF THE FCC'S RULES CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT AND THIS COURT'S DECISION IN *AT&T v. IUB*.

This Court should also grant certiorari to review the Eighth Circuit's invalidation of 47 C.F.R. §§ 315(c)-(f), which require incumbents, upon request, to combine leased elements in their network that are not already combined, or to combine leased elements in their network with the elements of new entrants.

1. The Eighth Circuit's decision is in direct and acknowledged conflict with two decisions of the Ninth Circuit. Pet. App. 21a-22a. While the Eighth Circuit was reconsidering its combinations decision on remand from this Court, the Ninth Circuit was called upon to assess the validity of an interconnection agreement arbitrated by the Washington state commission. That agreement included a requirement that, if requested by a new entrant, elements be provided in combination. Because the Eighth Circuit was reconsidering the validity of its rules, the Ninth Circuit assumed that sections (c)-(f) were not in force and that no FCC rule *mandated* "new" combinations. The Ninth Circuit thus turned to the question of whether the Act itself permits a state commission to impose such a requirement and concluded that, "under the rationale of *AT&T Corp.*," the provision was plainly valid. Citing this Court's holding in *AT&T* that nothing in the 1996 Act mandates that elements be provided only in separated form, the Ninth Circuit concluded that "[i]t . . . necessarily follows" that a provision requiring an incumbent to provide new combinations "does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts." *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000). The Ninth Circuit reiterated

this conclusion in a later case in which the same issue was presented, stating flatly that "the Eighth Circuit's interpretation of the Act was incorrect." 204 F.3d at 1268.

In the decision at issue here, the Eighth Circuit expressed its disagreement with the Ninth Circuit's analysis and reaffirmed its earlier decision that §§ 315(c)-(f) "violate the plain language of the statute" and, therefore, would remain vacated. Pet. App. 23a. Thus, as each of these courts acknowledges, there is a conflict between the Eighth and Ninth Circuits over the meaning of § 251(c)(3) of the Act.

2. The Eighth Circuit's invalidation of Rules 315(c)-(f) also conflicts directly with this Court's decision in *AT&T*. In *IUB*, the Eighth Circuit struck down Rules 315(b)-(f), on the basis that they conflicted with the Act's plain language. This Court reviewed only the invalidation of § 315(b) – which prohibits incumbents from separating network elements that are already combined – and reversed. In doing so, this Court rejected the argument that, in requiring the incumbent to provide network elements in a manner that "allows requesting carriers to combine" them, Congress contemplated the provisioning of elements *only* in physically separate pieces. Although the Act "assuredly contemplates that elements may be requested and provided in this form, it does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T*, 525 U.S. at 394. In short, "[t]he reality is that § 251(c)(3) is ambiguous," and, pursuant to *Chevron*, the FCC's reasonable regulation must therefore be upheld. *Id.* at 395.

On remand, the Eighth Circuit directed the parties to brief whether this Court's decision affected the validity of §§ 315(c)-(f). *See Iowa Utils. Bd. v. FCC*, No. 96-3321, *et al.*, Order on Remand from the Supreme Court of the United States, ¶ 7a (8th Cir. filed June 10, 1999). Yet, without even acknowledging this Court's decision, the Eighth Circuit again invalidated the

rules "[u]nder the first prong of Chevron," reasoning that "Congress has directly spoken on the issue of who shall combine previously uncombined elements. It is the requesting carrier who shall 'combine such elements.'" Pet. App. 22a-23a. Thus, the Eighth Circuit concluded, the plain language of the Act prohibits any FCC rule other than one requiring incumbents to provide access to unbundled network elements *only* in separated fashion. *Id.* That decision cannot be reconciled with this Court's reading of § 251(c)(3).

3. The restoration of Rules 315(c)-(f) is important to ensure that new competitors are not "seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." *Local Competition Order* ¶ 293 (Pet. App. 40a-41a). In particular, the FCC noted that "in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents' network without the assistance of the incumbent." *Id.* Thus, the FCC concluded, as a practical matter, new entrants cannot simply take uncombined elements within the incumbent's network and combine them themselves. Absent a requirement that the incumbent do the combining, competitors could thus not use unbundled network elements – the most promising of the Act's mechanisms for developing competition – to provide local service.

The real-world consequences of the Eighth Circuit's invalidation of Rules 315(c)-(f) are even graver than the FCC anticipated. Not only do new entrants lack the information necessary to enter an incumbent's facilities and combine elements, incumbents have flatly prohibited them from doing so. Thus, despite the Eighth Circuit's blithe assertion in *IUB*, 120 F.3d at 813, that "the fact that the incumbent LECs object to [the FCC's combinations] rule[s] indicates . . . that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them," incumbents

have repeatedly indicated that they would *not* allow new entrants to access their facilities in order to combine elements. In state arbitrations, for example, Southwestern Bell has asserted that the Texas Commission must deny such access because Southwestern Bell "has grave concerns regarding the implications of such an order on the security, integrity and reliability of its network; the quality of its service, and the privacy of its customers." Brief on Eighth Circuit Alternatives, *In re Petition of MFS*, Docket Nos. 16189 *et al.*, at 11 (Tex. Pub. Util. Comm'n filed Oct. 27, 1997). The former Bell Atlantic has similarly warned against allowing a new entrant's employees "with wire snips and screwdriver in hand, to work on" its equipment. Joint Brief of Interveners in Support of the FCC, *Iowa Utils. Bd. v. FCC*, No. 96-3321 at 59 (8th Cir. filed Aug. 16, 1999) (quoting Statement of Donald Albert ¶ 23). For its part, BellSouth has termed such access "an unwarranted and illegal intrusion." *Id.* (quoting Reply Affidavit of Alphonso Varner at 14). Indeed, petitioner is unaware of a single instance in which an incumbent allowed competing carriers access to the incumbent's elements in order to combine them.

This issue has taken on even greater importance because incumbents are rapidly expanding the scope of what they claim are "new" combinations. Seizing on the Eighth Circuit's decision, the incumbents consistently assert that any instance in which they have to combine elements, whether physically or electronically, is a new combination that they do not have to provide. Thus, when a consumer orders a second line for internet use, for example, incumbents have asserted that attaching the loop from that house to the incumbent's switch constitutes a new combination that need not be provided to new entrants. And, as explained above, incumbents are refusing to allow new entrants into the incumbents' facilities to do the combining themselves. This leads to the anticompetitive result that, if a customer orders a second line, that customer must first

obtain service from the incumbent (which does the combining) and then switch providers.

In short, just as the expert agency predicted, Rules 315(c)-(f) offer the only practical means to ensure that new entrants are able to obtain the elements they lease in a manner that allows them to use those elements to provide local service. In light of the importance of these rules to new entrants' ability to compete in local markets, review is plainly warranted.

III. THE EIGHTH CIRCUIT'S INVALIDATION OF THE FCC'S WHOLESALE PRICING RULES CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS, AND WILL EFFECTIVELY ELIMINATE THE USE OF RESALE AS AN ENTRY STRATEGY.

This Court should also review the Eighth Circuit's invalidation of the methodology by which the wholesale discount is to be calculated. As the FCC recognized, "[r]esale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities." *Local Competition Order* ¶ 907 (Pet. App. 127a). Accordingly, in implementing the Act's requirement that wholesale prices be calculated "on the basis of retail rates . . . excluding the portion . . . that will be avoided by the local exchange carrier" when it acts as a wholesaler, 47 U.S.C. § 252(d)(3), the FCC concluded that "[a]voided retail costs shall be those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier." 47 C.F.R. § 51.609(b). This ensures that incumbents cannot refuse to avoid costs that are reasonably avoidable, thus driving wholesale rates up for the sake of making resale impractical. *Local Competition Order* ¶ 911 (Pet. App. 129a). As the Commission found, it is inconceivable that Congress intended to mandate such a result. *Id.*

The Eighth Circuit held that the plain language of § 252(d)(3) foreclosed this sensible policy choice, because it believed that the statutory phrase "'will be avoided' refers to "those costs that the ILEC will actually avoid incurring in the future." Pet. App. 15a. This conclusion conflicts with the judgment of state commissions and federal courts that have considered the issue, and with the 1996 Act's language and purpose. As a result of the Eighth Circuit's decision, the wholesale discount rate contained in interconnection agreements throughout the country will be invalidated, and resale will cease to be a viable entry option.

1. Review is warranted because the Eighth Circuit's decision conflicts with that of virtually every state commission and federal court to have applied or reviewed the Act's wholesale cost standard. Indeed, even before the *Local Competition Order* issued, states including Colorado, Georgia, Illinois, New York, and Ohio adopted the "reasonably avoidable" methodology to calculate wholesale costs. *Local Competition Order* ¶ 911 (Pet. App. 129a). And during the period in which the FCC's rules were vacated by the Eighth Circuit, virtually every state commission to have reached the issue independently adopted this wholesale discount methodology, and every federal court to review those decisions upheld the use of a "reasonably avoidable" standard.[10/] The

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10/ *See, e.g.*, *Petition for Arbitration*, Docket No. UT-96C0338, Arbitrator's Report and Decision at 19-20 (Wash. Utils. and Transp Comm'n, Jan. 3, 1997); *Petition of MCI Telecommunications Corp. and its Affiliates*, Case No. TO-97-67, Arbitration Order at 44-45 (Mo. Pub. Serv. Comm'n, Dec. 11, 1996); *MCI v. Bell Atlantic-Virginia*, et al., Docket No. PUC960113, et al., Order Resolving Wholesale Discount for Resold Services at 5 (Va. State Corp. Comm'n, Nov. 8, 1996); US West Comm., Inc. Filing Advice Letter No. 2610 in Compliance with Comm'n Decision No. C96-521 Adopting Emergency Rules, Docket No. 96S-233T (Colo. Comm'n June 21, 1996); *Petition for AT&T for the Comm'n to Establish Resale Rules, Rates, Terms and Conditions and Initiate Unbundling of*

Eighth Circuit thus stands alone in concluding that the FCC's wholesale discount cost methodology violates the Act.

2. Prompt review of the Eighth Circuit's decision is necessary because it threatens to eliminate resale as a viable entry option. The national consensus on this point was correct – the Act does not mandate the use of a different cost methodology, and the "reasonably avoidable" standard best furthers the Act's purpose.

The Eighth Circuit has simply misread § 252(d)(3). The 1996 Act itself does not mandate a particular wholesale cost methodology, requiring only that wholesale prices be calculated "on the basis of retail rates . . . excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). Contrary to the Eighth Circuit's suggestion, the word "will" is not necessarily "a word of certainty" that does not allow for reasonable predictive judgments. Pet. App. 15a. The word "will" is susceptible of

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Services, Docket No. 6352U (Ga. Comm'n June 21, 1996); *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Tel. Co.*, Nos. 95-0458 and 95-0351 (consol.) (Illinois Commerce Comm'n June 26, 1996); *Joint Complaint of AT&T Comm. of New York, Inc., MCI Telecomm. Corp., Worldcom, Inc. d/b/a LDDS WorldCom and the Empire Ass'n of Long Distance Telephone Companies, Inc. against New York Tel. Co. Concerning Wholesale Provisioning of Local Exchange Service by New York Tel. Co. and Sections of New York Telephone's Tariff No. 900*, Case No. 95-C-0657 (New York Comm'n July 18, 1996); *Petition of Rochester Tel. Corp. for Approval of a Proposed Restructuring Plan*, Case 93-C-0103 (New York July 18, 1996); *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Comm'n June 12, 1990); *GTE South Inc. v. Morrison*, 6 F. Supp. 2d 517 (E.D. Va. 1998), *aff'd*, 199 F.3d 733 (4th Cir. 1999); *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, No. A 97-CV-132SS, 1998 WL 657717 at *114-*115 (W.D. Tex. Aug. 31, 1998).

many meanings, including "capability." Webster's Ninth New Collegiate Dictionary (1988) (*e.g.* the back seat *will* hold three people means the back seat is *capable* of holding three people). That is precisely the meaning the FCC attributed to the word will. In the FCC's view, the phrase "will be avoided" is best read to include costs the incumbent is reasonably "capable" of avoiding. At a minimum, the existence of multiple dictionary definitions demonstrates that by using the word "will," Congress did not intend to hamstring the FCC's ability to set a cost standard that best furthers the purposes of the Act.

The Eighth Circuit's decision is also inconsistent with Congress's goal of furthering competition. Although the Eighth Circuit did not indicate how state commissions are to make the predictive judgment of which costs "will be avoided," if they cannot do so by determining which costs reasonably can be avoided the only possibility that appears to remain is that state commissions must simply accept the incumbents' representations of what costs they will avoid, even if they announce that they plan to avoid no costs at all. As the FCC recognized, this will lead to wholesale rates so high that resale is foreclosed as a viable entry strategy.

This concern is not merely theoretical. During the period in which the FCC's rules were not in place, GTE introduced wholesale cost studies that failed to subtract costs that were reasonably avoidable, and *added* "resale opportunity costs" to the existing retail rate, *see GTE South, Inc. v. Morrison*, 6 F. Supp. 2d at 526 & n.4, producing wholesale rates *higher* than existing retail rates. Thus, if wholesale rates are set by reference to the costs that incumbents choose to avoid, the use of resale as an entry method will be effectively foreclosed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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